Supreme Court, U.S.
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No. 02-1287

IN THE

Supreme Court of the United States

GRIFFIN TELEVISION OKC, L.L.C.,
and CHRIS HALSNE,

Petitioners,

v.

H. L. MITCHELL, D.V.M.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement for petitioner, Griffin Television OKC, L.L.C., was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Respondent's Brief in Opposition suffers the same analytical flaw as the decision of the Oklahoma Court of Civil Appeals which it tries to support—the principal arguments are grounded on only that evidence favorable to Respondent rather than the whole record.[1] Thus, even if Respondent has fairly recited the evidence the state appeals court said it relied on to affirm the jury's actual malice determination, the Brief in Opposition does not fairly present all the evidence in the record below that properly bears on, and must as a constitutional matter be considered in making, that determination.

As a result, Respondent's arguments miss the mark on issues critical to the petition for a writ of certiorari. The decision below is "final" with respect to federal constitutional issues for purposes of this Court's certiorari review. The Oklahoma appellate courts openly and unquestionably failed to perform their constitutional duty to conduct an independent review of the whole record. Contrary to the Court of Civil Appeals' analysis, that whole record, reviewed independently, does not support a clear and convincing finding of actual malice. As a result, this litigation would be terminated by the Court's decision on the merits. Certiorari should be granted because the decision below is an unconstitutional infringement of Petitioners' rights and is squarely contrary to this Court's clear pronouncements. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 363

1. Respondent erroneously suggests that the appellate court's recitation of the facts should govern this Court's analysis because "the jury's underlying credibility assessments and factual determinations are still subject to a clearly-erroneous standard of review," Br. in Opp. 1 n.1. *See also* Br. in Opp. 22-23. Fed. R. Civ. P. 52(a) does not apply to state court actions. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). "No statute or rule governs [this Court's] review of facts found by state courts." *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (reasons for deferential standard of review of state-court factual findings do not apply to the review of an actual malice determination). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 285 & n.26 (1964) (independent review by this Court of facts bearing on actual malice not limited by the Seventh Amendment). Any conclusion about what credibility determinations the jury in this case made is mere speculation. *Cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 690 (1989) (sufficiency of actual malice evidence must be decided on "a less speculative ground" than what a jury *may* have found).

(1979) (certiorari granted where state-court judgment appeared inconsistent with Court's previous decision regarding constitutional rights).

1. The decision below is "final" within the meaning of 28 U.S.C. § 1257(a). This case falls within the fourth category of cases recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-487 (1975). To leave standing a constitutionally unsupportable finding of actual malice and the for-publication opinion of the Court of Civil Appeals that a jury's actual malice determination is to be reviewed deferentially – by examining only that evidence favorable to the prevailing plaintiff and ignoring all contrary evidence – clearly erodes the well-established requirement of the First Amendment that appellate courts, "as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511.[2] Although the Court of Civil Appeals contemplated further proceedings in state court, it is wholly uncertain that this Court will ever again have the chance to review the federal constitutional issues raised by this petition. Petitioners "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issues by this Court," *Cox Broadcasting*, 420 U.S. at 482.

Respondent contends that the decision below is not final under *Cox Broadcasting* because reversal by this Court on federal constitutional issues will not preclude further litigation in the state court. Br. in Opp. 12-15.[3] Respondent is mistaken. The Court of Civil Appeals did not sustain Petitioners' liability

2. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books v. Indiana*, 489 U.S. 46, 55 (1989).

3. Respondent interprets the fourth exception in *Cox Broadcasting* to require "three distinct conditions." Br. in Opp. 11. *Cox Broadcasting* and the cases upon which it relies to define the fourth exception treat the first and second "conditions" as alternative rather than cumulative circumstances. *Cox Broadcasting*, 420 U.S. at 482-483. Thus, because Respondent apparently concedes the first circumstance, Br. in. Opp. 11, the fourth exception of *Cox Broadcasting* is met here because erosion of federal policy is clear. Nevertheless, this case meets even the three conditions.

for either Respondent's defamation or his false light claim on state-law grounds. This Court's determination on the merits that the record does not clearly and convincingly demonstrate actual malice would foreclose further litigation.

a. With respect to the false light claim, Respondent misreads *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714 (10th Cir. 2000), and *Colbert v. World Pub. Co.*, 1987 OK 116, 747 P.2d 286, to say that the actual malice element of a false light claim under Oklahoma law is merely a state-law standard as to which the Court of Civil Appeals' sufficiency-of-the-evidence finding is unreviewable by this Court. *Colbert* did not create some state-law fault standard modeled roughly on *New York Times* actual malice. In reliance on *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and RESTATEMENT (SECOND) OF TORTS, § 652E, the court concluded that it was not free to select some lesser standard of fault than actual malice. *Colbert* described statements placing a plaintiff in a false light but not made with actual malice, as in *Hill*, as "statements falling within the constitutional guarantee of freedom of the press." *Colbert*, 747 P.2d at 290.[4] The decision of the Court of Civil Appeals here did not find sufficient evidence of actual malice as a matter of state law. It concluded – incorrectly, and without adequate review – that Respondent had proved *New York Times* actual malice. Clear and convincing proof of that level of fault was required to sustain a false light claim. Reversal of the jury's actual malice finding by this Court, after independent review of the whole record, would put an end to that claim.

b. With respect to his defamation claim, Respondent contends that negligence is a level of fault subsumed within the higher standard of actual malice; that the Court of Civil Appeals implicitly concluded (by affirming the finding of actual malice) that there was sufficient evidence of negligence to support liability; and that this Court's ruling on the actual malice question "would not affect Petitioners' liability on the defamation claim. . . . Whatever, this Court's holding, this case

4. *Zeran* does not hold that actual malice is a state-law standard. The argument advanced by the plaintiff and rejected by the court in that case, as in *Colbert*, was that actual malice was no longer constitutionally required in private-figure false light cases as a result of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

will return to the District Court for a new trial on the issue of compensatory damages." Br. in Opp. 14.

Respondent's analysis is fundamentally flawed.[5] While sufficient proof of actual malice might well suffice to prove negligence, it does not follow that evidence *inadequate* to establish a subjective reckless disregard of the truth is nevertheless adequate to establish, under an objective standard, the departure from professional standards necessary under Oklahoma law to sustain a private-figure defamation claim.[6] Theory aside, the Court of Civil Appeals did *not* hold that there was sufficient evidence of negligence, even in the circumscribed record it reviewed. To the contrary, the court said "[b]ecause Mitchell put on evidence of malice, he did not need to prove negligence." *Mitchell v. Griffin Television, L.L.C.*, 2002 OK CIV APP 115, ¶ 13, 60 P.3d 1058, 1063.

Respondent's defamation claim lacked proof of two essential elements: He failed to prove negligence, and he failed to present competent evidence of actual harm to reputation resulting from defamatory statements about him.[7] As a matter

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5. Respondent necessarily concedes (Br. in Opp. 14 n.10) that the sufficiency of the evidence to establish fault, even negligence, is a matter of constitutional significance requiring independent review of the whole record. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990). The Court of Civil Appeals did no more independent review of the record for evidence of negligence than it did for evidence of actual malice.

6. Respondent incorrectly suggests (Br. in Opp. 14 n.10) that expert testimony is not required under Oklahoma law. In *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 936 P.2d 940, expert testimony was presented. No private-figure defamation case in Oklahoma has affirmed a finding of liability without expert testimony. If there is expert evidence that the broadcaster acted in compliance with professional standards, a plaintiff cannot recover for defamation without expert testimony to the contrary, *see, e.g., Wiley v. Ohio/Oklahoma Hearst-Argyle Television, Inc.*, 33 Fed. Appx. 434, 2002 WL 511746 (10th Cir. 2002) (unpublished) (summary judgment affirmed where plaintiff did not adduce expert evidence of professional negligence).

7. Actual injury to reputation as a direct result of false statements about Respondent in the broadcasts (as opposed to other causes, such as the New Mexico and Oklahoma disciplinary proceedings against him) "is the essence of an action for defamation." *Zeran*, 203 F.3d at 719 ("Plaintiff's defamation claim fails because Plaintiff has not shown that

(Cont'd)

of trial strategy, clearly revealed in the record below, Respondent attempted to leap the evidentiary gaps in his defamation claim by trying to prove actual malice – thereby avoiding the need to prove professional negligence and, he assumed incorrectly with respect to presumed damages, the need to prove actual harm to reputation. However, having failed to prove negligence and actual harm to reputation, and (when the whole record is reviewed independently) having failed clearly and convincingly to prove actual malice, his defamation claim is subject to dismissal, not retrial. Respondent's proof at trial failed. Reversal by this Court on the merits of the actual malice issue should result in a judgment for Petitioners.

2. The Court of Civil Appeals applied an unconstitutional standard of review. Respondent's effort to excuse the Court of Civil Appeals' truncated review of the record ignores the critical issue that independent review is not measured by the physical extent to which the court looks at the evidence but by its intellectual attitude toward that evidence. That is, the Court of Civil Appeals said unabashedly that it would "determine the sufficiency of the evidence to sustain a judgment in light of the evidence tending to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it." *Mitchell*, 2002 OK CIV APP 115, ¶ 8, 60 P.3d at 1062. Thus, even had the court looked at the entire record, its review was not *de novo* but avowedly deferential because it ignored all evidence contrary to the verdict. This Court has rejected arguments that "appellate courts professing adherence to the rule of deference actually are reviewing

(Cont'd)

any person thinks less of him . . as a result of the broadcast."). *Accord*: *Hussain v. Palmer Communications Inc.*, __ Fed. Appx. __, 2003 WL 1558286, *4 (10th Cir. 2003) (unpublished) (same). Respondent concedes (Br. in Opp. 8 n.8) that his proof of actual injury was evidence of emotional distress and business losses, not harm to reputation. However, under *Zeran*, proof of emotional distress alone is not sufficient to sustain a defamation claim; and Respondent's trial evidence of business losses were those sustained by his hospital corporation, which had been dismissed as a party before trial.

de novo." *Salve Regina College v. Russell*, 499 U.S. 225, 235 (1991). Courts that profess deference are, in fact, deferring. The Court of Civil Appeals' stated standard of deferential review contravenes the constitutional *de novo* review requirement of *Bose*, and leaves to this Court the duty "to test challenged judgments against the guarantees of the First and Fourteenth Amendments." *Bose*, 466 U.S. at 508 n.27 (internal quotes and citations omitted).

3. The evidence in the whole record, reviewed independently, does not clearly and convincingly prove actual malice. Like the Court of Civil Appeals, Respondent finds evidence of actual malice in a perceived variance between the language of KWTV's news reports and individual documents (the federal court complaint and the NMHRC order) that Petitioners obtained prior to the broadcasts. The evidence in the whole record demonstrates those documents to be anything but "unambiguous." In particular, the NMHRC order left many open questions—answered to Halsne's satisfaction by Conwell, the official spokesman for the agency—about Petitioner's alleged involvement in the death of Doo Dominate. Regardless of the degree of ambiguity hindsight might reveal, as a constitutional proposition, the perceived disparity between a document and its interpretation in the broadcasts is not evidence of actual malice. *Bose*, 466 U.S. at 512-513. Even assuming the jury agreed with the interpretation of the documents favored by Respondent and the Court of Civil Appeals, that conclusion would bear on the issue of falsity, not constitutional fault. In *Harte-Hanks*, 491 U.S. at 681, this Court rejected the proposition offered by Respondent here: "Difference of opinion as to the truth of a matter—even a difference of 12 to 1—does not alone constitute clear and convincing evidence [of actual malice]." Rather, there must be clear and convincing extrinsic evidence that prior to the broadcasts, Petitioners in fact had knowledge or entertained a high degree of awareness of probable falsity. *Id.* (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). If there was a difference between what the documents said and what Petitioners reported, the Court of Civil Appeals did not refer to any evidence, nor does Respondent invite this Court's attention to any, that Petitioners *perceived* a difference

and knowingly reported as fact something they believed was probably not true. Viewed properly and independently, the record in fact shows they did not perceive such a difference, precisely because of evidence explicitly ignored by the Court of Civil Appeals – evidence from Conwell, the drafting lawyer, and others explaining what was behind the language of the order and the complaint.

Respondent accuses Halsne of engaging in a "flagrant falsehood" at trial, Br. in Opp. 25, from which the jury could reasonably infer actual malice. He suggests that the entire investigation conducted by Halsne consisted of a 12- or 13-minute interview with Conwell and a cursory review of documents from the NMHRC file. To the contrary, the on-camera interview of Conwell was only part of Petitioners' communications with New Mexico officials. As Halsne and Special Projects Producer Kim Albro testified, they received documents and talked extensively by telephone with the NMHRC before and after Halsne's trip to Albuquerque; while in Albuquerque, Halsne talked to Julian Luna (the Executive Director of the NMHRC), Conwell, and other NMHRC staff off-camera; and while reviewing documents for several hours, Halsne and his photographer were guided by the NMHRC staff (Tr. at 433-34, 441-43, 448-79, 482-83, 535-38, 540-41, 551-53, 565, 611-12, 651, 676, 679, 1233, 1258, 1261). Though Halsne and Conwell had differing recollections whether Conwell was physically present while Halsne reviewed NMHRC documents, it is undisputed that by the time KWTV's February 5, 1998 news report aired, Halsne had information which supported the key elements of what was said in the report: Mitchell worked illegally on Doo Dominate; the horse had a slab fracture of the knee that made it unfit to race; the horse nevertheless ran, broke down, and had to be euthanized; post-race testing confirmed the slab fracture and the presence of mepivicaine, an illegal painkiller; the matter had been extensively investigated; Mitchell had been banned for life from New Mexico racetracks; and he was suspected of helping kill Doo Dominate. Halsne and Conwell had already talked before the February 5 broadcast about the meaning of the drug tests, why the owner and trainer had not been prosecuted,

and why the NMHRC Decision and Order against Mitchell did not address the reasons for the breakdown of Doo Dominate. At trial, Conwell testified that KWTV's reports about Mitchell's role in the events in New Mexico were accurate and accurately reflected what Conwell, as the official spokesperson for the NMHRC, told Halsne. Halsne did not fabricate an investigation.[8]

4. Petitioners' rational interpretation of ambiguous public documents precludes a finding of actual malice. Petitioners' reporting relied, in part, on public documents, but their interpretation of those documents was shaped by information from other sources. Independent review of the record as a whole, which demonstrates Petitioners' rational and other-source-based interpretation of the public documents, precludes a finding of actual malice. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991); *Bose*, 466 U.S. at 512-513; *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971).[9]

Respondent's ineffective effort to distinguish *Time, Inc. v. Pape* is grounded on the unsupportable premise that the some of the documents Halsne examined were "unambiguous primary sources" and that an official spokesman for the public agency issuing the document is merely a "secondary source"

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8. Respondent also suggests that the broadcast of more reports about him after his counsel wrote letters to KWTV is further evidence of actual malice. Br. in Opp. 26 n.16. It is not. *See, e.g., Harte-Hanks*, 491 U.S. at 691 n.37; *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 252 (1st Cir. 2000); *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 427 (Tex. 2000); *Hart v. Blalock*, 1997 OK 8, ¶¶ 4-8, 932 P.2d 1124, 1126. Moreover, Respondent's counsel directed Halsne not to contact him. A plaintiff cannot claim actual malice if he has declined to discuss his position with the reporter. *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990); *Hodge v. WCPO Television News*, 29 Med.L.Rptr. 2597 (Ky.Cir.Ct. 2001).

9. Petitioners preserved this issue for appeal by moving in the trial court for a directed verdict (Tr. 1184-1204, 1523-24) on the ground, among others, that the evidence did not clearly and convincingly demonstrate actual malice. Petitioners raised the "rational interpretation" issue in their appellate briefs below. (The only text in Petitioners' Appendix at 68a-70a that was not included in the corrected reply brief submitted to the Court of Civil Appeals, *see* Br. in Opp. 27 n.17, was a reference in a footnote to a New Jersey case.) Neither the Court of Civil Appeals nor the Oklahoma Supreme Court held that Petitioners waived the issue in this case.

whose explanation of underlying events related to the document may, if not must, be ignored in a constitutional determination of actual malice.[10] Respondent's argument is squarely contrary to the constitutional requirement that all the facts in the whole record bearing on the actual determination be considered. The contention that Petitioners' state of mind about the information broadcast can be divined by contrasting what was reported with the federal court complaint and the NMHRC notice of proposed action and final order, to the exclusion of other evidence, flies in the face of every decision by this Court defining what is and what is not actual malice. As this Court said in *Pape*, 401 U.S. at 290 (emphasis added), "[t]o permit the malice issue to go to the jury . . . despite . . . *the external evidence of the Report's overall meaning*, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact."

Whether it be interviews of This Lady Sings' trainer and the legal counsel for the buyer who brought suit, who shed light on the facts and circumstances leading to the buyer's fraud and rescission claims against the seller reflected by the

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10. Conwell did not "create an illusion of ambiguity [about the NMHRC order] where none exists." Br. in Opp. 29. The order did not clear Mitchell of involvement in Doo Dominate's death. While the order said the "evidence presented at the hearing" did not support the charge that Mitchell aided Doo Dominate's owner and trainer in running an unfit horse, the order, which recited in detail the evidence that was presented at the hearing, showed on its face that the State had elected to present no evidence on that charge at all. As Conwell explained to Halsne, Mitchell's absence from the hearing eliminated the need to present all the evidence developed in the investigation about Mitchell's role in the death of Doo Dominate, because his track license could be revoked on the sole ground he practiced veterinary medicine illegally. As the order itself demonstrates, evidence of illegal veterinary practice was the only "evidence presented at the hearing." That a State drops charges against an accused does not mean that a publisher cannot report, and the reporter not believe he is accurately reporting, that evidence to support the charge had been developed in an investigation. *Cf. Cobb v. Time, Inc.*, 278 F.3d 629 (6th Cir. 2002) (applying correct standard and reversing jury verdict of actual malice, finding that, in *Sports Illustrated* report that plaintiff was involved in a fixed boxing match, reporters relied on information from executive director of state athletic commission that he believed the fight was fixed, even though commission did not sanction boxer).

lawyer's choice of words in the federal court complaint; or whether it be interviews of Conwell and other NMHRC staff, and other documents in the NMHRC file, which fleshed out the facts and circumstances revealed in the investigation into the death of Doo Dominate, the undeniable fact remains that the whole record shows that Petitioners had sources that they believed credible to support what was broadcast. Petitioners' state of mind – whether they "acted with a knowledge of falsity or with a 'high degree of awareness of . . . probable falsity,'" *Harte-Hanks*, 491 U.S. at 681 (internal citation omitted) – cannot be measured, as the Court of Civil Appeals did and as Respondent proposes this Court do, by reference to isolated public documents, where the record as a whole reveals other sources (especially an official spokesperson) that support the statements that were broadcast. The evidence in the record as a whole does not clearly and convincingly demonstrate actual malice.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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